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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM GUSTAFSON, et al.,

Plaintiffs and Respondents,

v.

MARK C. MAZZARELLA, et al.,

Defendants and Appellants.

D052342

(Super. Ct. No. 37-2007-00069308-
CU-PN-CTL)

APPEAL from orders of the Superior Court of San Diego County, Kevin A. Enright and Michael M. Anello, Judges. Affirmed.

Plaintiff and respondent William Gustafson and his personal limited liability company (LLC), Fore Partners (Gustafson or plaintiffs), brought this action for damages against numerous former business associates and the attorneys for some of those business associates, defendants and appellants Mark C. Mazzarella and Mazzarella Calderelli LLP (Mazzarella). Gustafson generally alleges that he is entitled to recover damages and other relief regarding the expenses he incurred when he participated in a real estate

transaction that he pursued from 2003-2005 with his former business associate and lawyer, defendant Jerry Palmer, through their limited liability company, defendant Quail Ranch Development (QRD; neither QRD nor Palmer is a party to this appeal). The real estate transaction went bad in 2005. In the potential seller's 2006 bankruptcy settlement, it paid \$1.8 million to QRD.

In this action, Gustafson alleges Palmer wrongfully took control of the distribution of the QRD settlement proceeds, and Gustafson did not get his proper share of the money and was otherwise damaged, due in part to breaches of the QRD operating agreement. As relevant here, he contends that Mazzarella, acting in his professional capacity, engaged in impermissibly conflicting legal representation of defendants Palmer and QRD, against Gustafson, at a time when Gustafson and his LLC, Fore Partners, were effectively also managing members of QRD. Specifically, the manager of QRD was another LLC formed by these individuals and their companies, Quail Ranch Partners (QRP, which was formed by Palmer's family trust and Fore Partners/Gustafson). In the view of Fore Partners and Gustafson, the existence of QRP as manager of QRD created, on the part of Mazzarella, professional duties of loyalty to QRD that were breached, when Mazzarella represented QRD and Palmer at the time they sued Fore Partners and Gustafson in a previous action, without disclosure or consent to conflicting representation. (*Palmer v. Gustafson* (Super. Ct. San Diego County, 2006, No. GIC 867643); the "original action.")

In response to the filing of the current complaint, Mazzarella brought a special motion to strike the two causes of action applicable to him, pursuant to Code of Civil

Procedure¹ section 425.16 (the anti-SLAPP statute, strategic lawsuits against public participation). (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57 (*Equilon*); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90-92 (*Navellier*).) Specifically, the motion attacked the causes of action seeking damages for Mazzarella's alleged aiding and abetting of breaches of fiduciary duty by Palmer, and damages for Mazzarella's professional malpractice. Mazzarella contended in the motion that all the allegations about his participation in the transaction and its aftermath dealt solely with protected petitioning conduct, i.e., the filing of the original action on behalf of Palmer against Gustafson. (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087 (*Chavez*) [filing of a lawsuit is deemed a constitutionally protected right to petition the government].) Mazzarella seeks dismissal of the current complaint under anti-SLAPP principles.

The trial court denied Mazzarella's motion to strike those portions of the complaint, ruling that his challenged conduct was not on its face entitled to the benefits of section 425.16, because it did not fall within the statutory language defining protected communications in litigation or petitioning activity affecting the public interest. (§ 425.16, subds. (e)(1) & (4).) Because of those conclusions, the court did not reach the second portion of the statutory test under the anti-SLAPP statute, i.e., it ruled that the burden had not been shifted to Gustafson to establish the probability that he will prevail on these specific claims.

¹ All statutory references are to the Code of Civil Procedure unless otherwise specified.

Mazzarella appeals, contending the trial court erred as a matter of law in finding the anti-SLAPP statute was inapplicable by its terms. He argues the subject causes of action clearly arose out of protected petitioning activity, because they are based on factual allegations about Mazzarella's efforts to act in a professional capacity on behalf of his clients, Palmer and QRD, by filing the original action against Gustafson and Fore Partners. Mazzarella's declaration states that he never spoke to or agreed to represent those other parties, so they could not have expected him to owe them any professional duties.

On de novo review, we agree with Gustafson that the record may arguably support a conclusion that Mazzarella's representation of QRD also gave rise to some kind of implied in fact or implied in law duties to Gustafson and Fore Partners. At the time that Mazzarella was retained by QRD, at the request of Palmer, the managing agent of QRD was QRP. The managing agents of QRP were Palmer's family trust and Fore Partners; and Fore Partners was managed by Gustafson. From this set of facts, the trial court read the face of the pleadings as alleging more than protected petitioning conduct, based in part on claimed breaches of the QRD operating agreement, so that the anti-SLAPP statutory protections did not clearly apply as a matter of law. At this stage of the proceedings, the trial court correctly concluded that the current causes of action against Mazzarella did not fall within the protection of the statute. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A

Background and Complaint

We will outline the background facts in a somewhat abbreviated manner, since the purpose of this opinion is not to resolve the merits of the overall dispute, but rather to determine whether the anti-SLAPP statutory scheme properly applies to this set of allegations concerning the parties' interactions in the management of QRD. Palmer joined together with Gustafson to form the limited liability company QRD, for the purpose of purchasing a golf course property in Riverside County from an entity known as Badlands at Moreno Valley, LLC (Badlands). As a California LLC, QRD has an operating agreement providing for its management, including restrictions on removal of managers. (Corp. Code, § 17000 et seq.) QRD has both managing and nonmanaging members (investors).

Palmer's family trust and Gustafson's company, Fore Partners, as 50 percent each members, also created a Delaware limited company or LLC, QRP, for the management of QRD. Thus, Palmer and Fore Partners (Gustafson's Delaware LLC) were co-managers of QRP. It also has an operating agreement providing for its management and limitations on management authority. Beginning in mid-2003, the plan was for Gustafson to raise investment capital so that QRD could buy the property from Badlands, and he made significant monetary contributions. However, Badlands went bankrupt in March 2005, and the subject property was sold to a third party. In the bankruptcy court, QRD pursued

the seller and obtained a settlement of \$1.8 million in the spring of 2006. On behalf of QRD, Palmer distributed the settlement proceeds.

Through QRD and Palmer's original complaint, filed in June 2006 by Mazzarella (after the settlement was reached with Badlands), they sought to remove QRP as manager and claimed that Gustafson and Fore Partners had breached contractual duties to provide timely funding to assist in QRD's purchase of the land, and had also committed breaches of fiduciary duties and fraud. Gustafson obtained a change of venue order to Orange County, but before the matter was transferred, in September 2006, Palmer and QRD filed a new action in Orange County on the same claims. (*Palmer v. Gustafson* (Super. Ct. Orange County, 2006, No. 06CC10033), the Orange County action.)²

In June 2007, the current action was filed by Gustafson and Fore Partners, making allegations against Palmer and QRD of breach of fiduciary and contractual duties and fraud. Gustafson claimed that Palmer wrongfully paid the \$1.8 million settlement proceeds to himself as development fees, to third party creditors and investors as refunds, and to Mazzarella as a retainer fee. Gustafson claimed that under the terms of the QRD/QRP operating agreements, no further contributions were due from him, and therefore the settlement monies were properly owing to him and to Fore Partners. Further, Gustafson claimed that Palmer had wrongfully requested third party investors to approve a requested resignation of QRP as manager of QRD, which was in violation of

² The trial court took judicial notice of the existence of the pleadings in the two other cases filed regarding these parties, in Orange County (cited above) and the original case filed by Palmer. (Evid. Code, §§ 452, 459.)

the operating agreement. That is, the day before the original complaint was filed in the previous action, Palmer sent a letter to investors stating that he had "previously" retained Mazzarella to represent QRD in litigation against Gustafson and Fore Partners, who had allegedly caused the project to fail. Before any such investor election took place to remove QRP, Palmer and QRD filed that original action.³

In the current action, Gustafson/Fore Partners are claiming that QRP was not validly removed from managing QRD, pursuant to the operating agreements, and that Mazzarella therefore still owes them fiduciary duties. Thus, they allege that through their membership in QRP and its managing relationship to QRD, they were owed fiduciary duties by the attorney for QRD, Mazzarella. He allegedly violated the rules of professional conduct against conflicting dual representation by siding with Palmer and QRD at a time when they also owed fiduciary duties to the other QRP managers, including Fore Partners. (Cal. Rules Prof. Conduct, rules 3-300, 3-310.)

The challenged causes of action regarding Mazzarella incorporate the earlier allegations about the corporate structure and operating agreements of QRD and its managing members, including QRP, and allegations about duties owed between the parties. Gustafson alleges Mazzarella aided and abetted breaches of fiduciary duty by Palmer, particularly with respect to controlling the settlement proceeds and distributing

³ Palmer's letter to the June 15, 2006 investors is attached as an exhibit to the current complaint, and may be considered as part of the face of the pleading. The trial court's ruling excluded the same letter as an exhibit to an attorney declaration in the anti-SLAPP motion proceedings, but that ruling does not dispose of the issues concerning the letter, to the extent it was made a part of the pleading.

them. Gustafson also contends Mazzarella committed legal malpractice and breach of his own fiduciary duties, when he agreed to represent QRD at a time when Fore Partners, through QRP, was one of the managing members of QRD. Gustafson contends the retainer fee paid to Mazzarella by Palmer was taken from settlement proceeds that were lawfully owed to Gustafson and Fore Partners, and that it was inappropriate for the Mazzarella firm to sue Gustafson and Fore Partners, who were "their own clients."⁴

B

Special Motion to Strike

In response to the filing of the complaint, Mazzarella filed the special motion to strike, arguing that all allegations of his activities in connection with the transaction arose from protected petitioning activity. Mazzarella provided his own declaration stating that he and his firm were retained by Palmer and QRD to represent their interests regarding claims they wished to pursue regarding Gustafson and Fore Partners, as set forth in the Orange County litigation. Mazzarella states that he was never retained to represent Gustafson and/or Fore Partners and he never talked to or advised Gustafson and/or Fore Partners that he had any intent to represent their interests. Additionally, Mazzarella argued plaintiff would not be able to demonstrate a probability of prevailing on the claims against him. He answered the complaint.

⁴ In this appeal, Gustafson states that Mazzarella unsuccessfully brought demurrers to the cause of action that alleged his aiding and abetting of Palmer's breaches of fiduciary duty, regarding limitations on the use of conspiracy theories between attorney and client. (Civ. Code, § 1714.10.) In his respondent's brief, Gustafson suggested he would seek to augment the record to add the record on that demurrer, but he never did so. The issues before us do not require any such record.

Gustafson filed opposition, arguing that by virtue of Fore Partners' participation in QRP and therefore in QRD, he and Fore Partners were clients who were owed duties by Mazzarella, based in part on their interpretation of the operating agreements. Gustafson argued that Mazzarella's conduct was illegal and a breach of professional duty, and that such illegal conduct could not constitute protected activity within the meaning of the anti-SLAPP definitions. Reply papers were filed. Evidentiary objections were filed by Mazzarella, against opposing counsel's efforts to authenticate Palmer's June 15, 2006 letter to the investors. (See fn. 3, *ante*.)

C

Ruling on Appeal

The tentative ruling was to grant the motion, but after oral argument, the trial court denied Mazzarella's motion to strike causes of action 7 and 8. In its reasoning, the court first took judicial notice of the pleadings in the three cases filed regarding these parties. The court found that the statutory purposes of section 425.16 (to protect against the chilling of valid exercises of the constitutional rights of freedom of speech or petitions for the redress of grievances) would not be promoted if the motion were granted. The court outlined the two-step analytical process to be applied. Then, the court relied on *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356 (*Paul*) (disapproved by *Equilon*, *supra*, 29 Cal.4th 53, 68) and *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*), to address whether only valid, protected petitioning conduct by Mazzarella was allegedly involved. As those case holdings were summarized by the trial court:

"*Paul*, which involved allegations of illegal money laundering, states that where a factual dispute exists about the legitimacy of defendants' conduct, it cannot be resolved on the first step of the special motion to strike analysis. *Flatley*, which involved a putative demand letter from a lawyer that constituted patent extortion, concludes that when either the defendant concedes, or the evidence conclusively establishes, that the protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action."

Based on those principles, the trial court identified the "salient issue" as whether there was a factual dispute about the occurrence of any illegal or improper conduct in the course of Mazzarella's representation of Palmer and QRD, under the rules of professional conduct. Specifically, the court decided that the face of the pleading supported a conclusion that the Mazzarella law firm had an attorney-client relationship with QRD, and therefore it may have owed a duty of care to Fore Partners as co-managing member of QRP and QRD. The court stated that Attorney Mazzarella's declaration did not sufficiently dispute or resolve contentions that he had allegedly intentionally aided and abetted the breach of fiduciary duties by Palmer, nor dispute that other breaches of duty may have occurred. Rather, the court concluded:

"Attorney Mazzarella's declaration admits he and his firm were retained by Jerry Palmer and Quail Ranch Development. He only avers at 2:5-6 that he was never retained to represent Gustafson and/or Fore Partners. He and his firm have not demonstrated a 'dispute' over the legitimacy of defendants' conduct alleged in paragraphs #s 121-130 of the complaint. The conduct of Mazzarella about which Gustafson and Fore Partners complain is not that they filed a lawsuit in Orange County but that they sided with Jerry Palmer and QRD at a time when they also owed fiduciary duties to Gustafson and Fore Partners in their capacity as co-managers of the limited partnership Quail Ranch Partners, which managed QRD. [¶] Thus Mazzarella et al has not carried their initial burden to show they are covered by CCP 425.16 and their special motion to strike is

denied. The 2nd prong of the analysis requiring plaintiffs to show a substantial probability of prevailing is not reached."

Mazzarella appeals the ruling.

DISCUSSION

Mazzarella chiefly argues the trial court erred in denying his motion to strike the complaint, because he believes all the challenged conduct occurred in the course of preparing for litigation and filing the complaint, and was therefore protected petitioning activity under section 425.16. (*Chavez, supra*, 94 Cal.App.4th 1083, 1087.) He contends the trial court erred in relying on any consideration of the validity of his conduct, as discussed in *Flatley, supra*, 39 Cal.4th 299, and that any malpractice allegations are groundless due to a lack of any attorney-client relationship with Gustafson and Fore Partners.

Mazzarella further contends the trial court erroneously declined to reach the second prong of the anti-SLAPP statute, because it failed to recognize he had successfully shifted the burden to Gustafson to demonstrate there is a probability that he will prevail on the complaint, and in any case, Gustafson failed to make such a showing.

In the briefs on appeal, Gustafson/Fore Partners only address the initial prong of the anti-SLAPP analysis, and contend that the burden was never placed upon them to show a probability of prevailing. They argue the trial court was correct in determining that the principal thrust of the complaint addresses breaches of professional duties by Mazzarella, that were owed to them, or that he assisted in breaches of duties owed to them by Palmer. Arguably, those duties were owed to Gustafson and/or Fore Partners

through their membership in QRP, which was acting as a managing agent of QRD at the relevant time periods, and Mazzearella represented QRD.

To address these issues, we first set forth our rules of review, and then seek to clarify the scope of the professional representations allegedly undertaken by Mazzearella during the transaction and its aftermath, whether actually or impliedly, and to whom. This will allow us to determine whether it is protected petitioning conduct that is principally or substantially alleged in the complaint, within the meaning of the anti-SLAPP statutory scheme. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 105-106 (*Mann*).)

I

APPLICABLE STANDARDS

On appeal, we review de novo the trial court's ruling on the motion to strike. (*Martinez v. Metabolife International, Inc.* (2003) 113 Cal.App.4th 181, 186 (*Martinez*); *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 726-727 (*Freeman*).) Whether section 425.16 applies to a particular complaint amounts to a legal question subject to de novo review. (*Ibid.*; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906.)

In an anti-SLAPP motion, the moving defendant is first required to make a prima facie showing the plaintiff's action is subject to section 425.16, by showing the defendant's challenged acts were taken in furtherance of constitutional rights of petition or free speech as defined by the statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) Normally, if a defendant satisfies the first portion of this test, the trial court next addresses whether it is reasonably probable the plaintiff will prevail on the

merits at trial. (§ 425.16, subd. (b)(1).) However, a court need not reach this second prong of the analysis if the "arising from protected conduct" requirement is not met. (*Equilon, supra*, 29 Cal.4th 53, 67; *Navellier, supra*, 29 Cal.4th 82, 88-89.)

A cause of action may only be stricken under the anti-SLAPP statute if it arises from protected speech or petitioning activity and lacks even minimal merit. (*Mann, supra*, 120 Cal.App.4th 90, 105-106; *Navellier, supra*, 29 Cal.4th at p. 89.) "Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure." (*Mann, supra*, at p. 106.) The principal thrust or gravamen of the plaintiff's cause of action is considered in determining whether the anti-SLAPP statute applies. (*Martinez, supra*, 113 Cal.App.4th 181, 186-188). Where substantial parts of the factual basis for the complaint are protected statements or conduct, the anti-SLAPP statute will apply. (*Mann, supra*, at p. 105.) Likewise, if arguably unprotected statements are alleged, but they are only incidental or collateral to a cause of action based essentially on protected activity, the anti-SLAPP statutory scheme may still provide protection. (*Martinez, supra*, at pp. 186-188; *Peregrine Funding, Inc. v. Sheppard Mullin Richter Hampton LLP* (2005) 133 Cal.App.4th 658, 670-673 (*Peregrine Funding*).)

Where the plaintiff is pleading causes of action that are related to or associated with earlier litigation-related activities, the courts must examine which acts in that process gave rise to the asserted claims, for purposes of applying the anti-SLAPP statute.

(*Navellier, supra*, 29 Cal.4th at p. 92.) In *Freeman, supra*, 154 Cal.App.4th at page 729 to 730, this court explained these limitations as follows:

" 'Although a party's litigation-related activities constitute "act[s] in furtherance of a person's right of petition or free speech," it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute A claim "arises from" an act when the act " ' "forms the basis for the plaintiff's cause of action". . . . ' " [Citation.] "[T]he 'arising from' requirement is not always easily met." [Citation.] A cause of action may be "triggered by" or associated with a protected act, but it does not necessarily mean the cause of action *arises* from that act. [Citation.] As our Supreme Court noted: "California courts rightly have rejected the notion 'that a lawsuit is adequately shown to be one "arising from" an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself.' " ' [Citation.]"

During review of an anti-SLAPP order, we do not address the relative merits of the parties' claims and defenses, but instead determine only whether the challenged order correctly analyzed the record thus far. (*Freeman, supra*, 154 Cal.App.4th 719, 732-733.) "[I]t is not our task to resolve factual disputes or make credibility determinations on [a] section 425.16 motion; we accept plaintiffs' evidence as true for purposes of our analysis." (*Id.* at p. 733.)

II

STATUTORY SCHEME: FIRST PRONG

To focus upon the "activity that gives rise to [Mazzarella's] asserted liability" (*Navellier, supra*, 29 Cal.4th at p. 92), several criteria must be considered, as we next outline. Some or all of Mazzarella's acts were written or oral statements or writings "made before a . . . judicial proceeding" (§ 425.16, subd. (e)(1)), which may be

protected. We first analyze the nature of the causes of action alleged, and set forth rules for determining whether there was potentially an attorney-client relationship here, as alleged by Gustafson as the foundation for his claims. We may then assess whether any protected petitioning conduct that was claimed to injure plaintiffs is a substantial part of the claims, or is merely incidental or collateral to them. (*Martinez, supra*, 113 Cal.App.4th at pp. 186-188.) Finally, we will turn our attention to the trial court's ruling about the second prong of the anti-SLAPP analysis.

A. Nature of Claims: Legal Malpractice

In his seventh cause of action for aiding and abetting breach of fiduciary duty, plaintiff claims Mazzarella assisted in Palmer's breaches of duties owed to plaintiffs. As explained in *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325-1326, "[l]iability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." [Citations.]

In the eighth cause of action, professional malpractice is pled based on duties arguably owed by Mazzarella in his professional capacity when he acted as an attorney for QRD (e.g., also owed to QRP and manager Fore Partners). Both these causes of action are confined to theories based on Mazzarella's requested performance of professional duties. These duties logically would have included attention to the QRD operating agreement and its restrictions on removal of managers. Thus, we may treat

both theories as raising the same statutory interpretation questions, i.e., whether these claims "arose" from Mazzarella's acts "in furtherance of the person's right of petition or free speech." (§ 425.16, subd. (b)(1), (e)(1).)

Mazzarella focuses upon the filing of the complaint on June 16, 2006 as giving rise to all of the plaintiffs' claims. It is well-established that an attorney's communications that are preparatory or in anticipation of bringing an action or other official proceeding may also fall within the protection of section 425.16. " '[C]ourts have adopted 'a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16.' [Citation.]' [Citation.] Accordingly, although litigation may not have commenced, if a statement 'concern[s] the subject of the dispute' and is made 'in anticipation of litigation 'contemplated in good faith and under serious consideration,' ' [citations] then the statement may be petitioning activity protected by section 425.16." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268; see *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783-784 (*Dove*).)

The complaint includes an attachment showing that Mazzarella had already been retained by Palmer and QRD the day before he filed the original complaint on their behalf. From all the allegations and potential factual inferences, the question under the anti-SLAPP statute becomes whether the plaintiffs have pled a foundation for their claims of professional malpractice, in the form of duties owed directly or indirectly to them, by Mazzarella. Plaintiffs base those alleged duties in part upon the QRD/QRP operating agreements.

B. Identity of Clients--Corporation/Constituents

Mazzarella was retained by Palmer on behalf of QRD to investigate filing claims against Gustafson and Fore Partners, who are now claiming that professional duties were owed to them. In simultaneous representation cases, the Supreme Court in *Flatt v. Superior Court* (1994) 9 Cal.4th 275 (*Flatt*), stated that "[t]he primary value at stake in cases of simultaneous or dual representation is the attorney's duty-and the client's legitimate expectation-of *loyalty*, rather than confidentiality." (*Id.* at p. 284.)

To support their allegations of breach, plaintiffs must establish a duty was owed by the professional to the claimant: " 'Absent duty there can be no breach and no negligence.' [Citation.] 'An attorney generally will not be held liable to a third person not in privity of contract with him since he owes no duty to anyone other than his client. The question of whether an attorney may, under certain circumstances, owe a duty to some third party is essentially one of law and, as such, involves "a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances. [Citations.]" ' [Citation.]" (*Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 700-701 (*Skarbrevik*).) We next review the complaint's allegations to determine if, as a matter of law, plaintiffs can arguably bring themselves within the scope of duties owed by the attorney to the client.

It is first necessary to examine the parties' relationship to QRD, since QRD was a client of Mazzarella. Witkin explained the nature of such a limited liability company as a "hybrid business entity that combines aspects of both a partnership and a corporation. It is formed under the Corporations Code and consists of "members" who own membership

interests. . . . [¶] The company has a legal existence separate from its members. It provides members with limited liability to the same extent enjoyed by corporate shareholders, yet allows members to actively participate in management and control. [Citation.]" (9 Witkin, Summary of Cal. Law (10th ed. 2005) Partnerships, § 136, pp. 697-699.) The operating agreement of an LLC "generally regulates the company's affairs and business, and governs relations among its members." (*Id.* at § 147, p. 710.) As members of QRP, which had duties to manage QRD, plaintiffs are alleging, against Palmer, various breaches of the QRD/QRP operating agreements.

With respect to Mazarella, plaintiffs are alleging his legal representation of QRD also created duties toward its managing member, QRP, from which duties are derived in favor of QRP members Gustafson and Fore Partners. Under the California Rules of Professional Conduct, Rule 3-600(A), in representing an organization such as an LLC, "an attorney must conform the representation to the concept that the organization itself is the client, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement. [Citations.]" (1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, § 446, p. 563.) The comments to that rule include observations about problems that may arise when attorneys perform professional engagements for both an organization and its major constituents: "When a change in control occurs or is threatened, attorneys are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. In resolving these multiple relationships attorneys must rely on case law." (*Ibid.*) Some of these problems might be avoided as follows:

"An attorney representing an organization may also represent the organization's directors, officers, employees, members, shareholders, or other constituents, subject to the disclosure and consent provisions of Rules of Professional Conduct, Rule 3-310 [citation]. If the organization's consent to dual representation is required by Rule 3-310, consent must be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented. [Citation.]" (1 Witkin, Cal. Procedure, *supra*, Attorneys, § 449, p. 565.)

In *Skarbrevik, supra*, 231 Cal.App.3d 692, 703-704, the court explained that "[a]n attorney representing a corporation does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation also benefit the stockholders; as attorney for the corporation, counsel's first duty is to the corporation. [Citation.] Corporate counsel should, of course, refrain from taking part in any controversies or factional differences among shareholders as to control of the corporation, so that he or she can advise the corporation without bias or prejudice. [Citation.] . . . These cases make clear that corporate counsel's direct duty is to the client corporation, not to the shareholders individually, even though the legal advice rendered to the corporation may affect the shareholders." (See also *Benasra v. Mitchell Silberg & Knopp* (2004) 123 Cal.App.4th 1179, 1189 [section 425.16 did not apply to strike a former client's suit against a law firm for breach of duty of loyalty, where the former client had clearly been abandoned].)

These rules indicate that under the facts alleged here, it cannot now be determined as a matter of law that the Mazzarella defendants could have owed no professional duty of care to plaintiffs, through the representation of members and managers of QRD and indirectly, QRP and/or Fore Partners. Such duty could be based upon legal interpretation

of the QRD/QRP operating agreements. The question then becomes whether the principal thrust of the complaint relates to protected petitioning activity or to unprotected breaches of arguably owed or implied duties.

C. Scope of Statutory Protection Under Applicable Portion of Test

In *Peregrine Funding*, the holding was that in cases where protected activities and nonprotected activities are alleged in the same cause of action, the cause of action is not subject to section 425.16 if the protected activities are "merely incidental" or "collateral" to the nonprotected activities. (*Peregrine Funding, supra*, 133 Cal.App.4th at p. 672, cited in *Freeman, supra*, 154 Cal.App.4th at p. 733.) Conversely, in *Mann, supra*, 120 Cal.App.4th 90, when we examined the defamation cause of action, we noted that the defendants' protected "reports to governmental agencies formed a substantial part of the factual basis for the defamation and trade libel claims," so that accordingly, the defamation claim was properly subject to the anti-SLAPP statute. (*Id.* at p. 104.)⁵ In *Mann, supra*, at page 105, we relied on *Navellier, supra*, 29 Cal.4th at page 94, as authority that a court need not inquire into the "validity" of the speech, at the stage of

⁵ In *Mann*, the defendants were former associates and competitors of the plaintiff, and they allegedly told plaintiff's customers that plaintiff was using illegal chemicals in its business and discharging them into the water supply, and defendants had also reported such alleged business practices to the National Response Center and the National Terrorist Hotline, resulting in an investigation. We concluded that the basis of the defamation cause of action, among others, was not only the comments made to plaintiff's customers, "but also defendants' reports to governmental agencies-*petitioning activity protected under section 425.16, subdivision (e)(2).*" (*Mann, supra*, 120 Cal.App.4th 90, 104-105; italics added.) Also, the plaintiff was able to make out a prima facie case that it would prevail on defamation claims. (*Id.* at p. 107.) Ultimately, this court affirmed the trial court's order denying the defendants' motion to strike, with some exceptions not relevant here. (*Id.* at pp. 112-113.)

determining whether the anti-SLAPP statute potentially applies. Here too, when we examine the allegations of the complaint as a whole, we do not find that the petitioning activity is the principal or the most substantial aspect of the claims, but instead it is incidental or collateral to the substantive breaches of duty that are claimed, based in part on the QRD operating agreement. Even without evaluating the validity of the claims, we conclude the bulk of the challenged conduct does not fall within the protected definitions, under the first prong of the test. (*Peregrine Funding, supra*, at p. 672.)

Here, as in *Freeman, supra*, 154 Cal.App.4th 719, 732, "[w]e agree with plaintiffs that the principal thrust of the conduct underlying their causes of action is not [the attorney's] filing or settlement of litigation. Stated another way, the 'activity that gives rise to [his] asserted liability' [citation] is his undertaking to represent a party with interests adverse to plaintiffs, in violation of the duty of loyalty he assertedly owed them in connection with the [original] litigation. '[I]f the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion.' [Citation.]"

In light of these authorities, we cannot say that the allegations about Mazzarella's filing of the original action are the main or essential target of the complaint. Rather, the act of filing of the original litigation is incidental to the underlying allegations of professional malpractice or negligence, through failure to properly represent the interests of all the participants in QRD, including QRP, Gustafson and Fore Partners. Mazzarella's activities were also alleged to have taken place in the formative stages of the original

lawsuit, including the settlement distributions, in light of the operating agreement provisions. The principal thrust of the complaint is to seek recovery for alleged breaches of professional duty arising from simultaneous representation of clients with adverse interests, as opposed to the action of simply filing the original complaint. This complaint should be read as alleging that corporate counsel's substantive duties to the client corporation QRD may have given rise to other duties that were breached here, therefore bringing this matter facially outside the scope of the anti-SLAPP protections.

III

STATUTORY SCHEME: SECOND PRONG

In the anti-SLAPP context, the ordinary rule to be applied is that "any claimed illegitimacy of the defendant's conduct must be resolved as part of a plaintiff's secondary burden to show the action has 'minimal merit.' " (*Flatley, supra*, 39 Cal.4th at p. 319, *id.* at pp. 334-335 (conc. opn. of Werdegarr, J.), citing *Navellier, supra*, 29 Cal.4th at pp. 87, 94.) In certain "rare cases," the Supreme Court in *Flatley, supra*, 39 Cal.4th 299, 316, said that if " 'the defendant concedes, or the evidence conclusively establishes' " that the assertedly protected speech or petition activity was illegal as a matter of law, then such a defendant "is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Id.* at p. 320.)

Here, although the trial court's ruling referred to disputed facts about the legitimacy, or lack thereof, of the challenged conduct, its order did not conclusively address the disputes about any actual or implied duties owing by Mazzarella to the plaintiffs (or breaches). This is not the "rare case" in which illegality must be determined

as a matter of law. (*Flatley, supra*, 39 Cal.4th at p. 320.) We need not decide whether an alleged breach of the rules of professional conduct amounts to "illegitimate" or somehow illegal conduct, that would facially prevent coverage by the anti-SLAPP statutory scheme.

In any event, "merits based arguments have no place in our threshold analysis of whether plaintiffs' causes of action arise from protected activity." (*Freeman, supra*, 154 Cal.App.4th 719, 733.) The evidence cannot be deemed at this time to defeat plaintiffs' claims as a matter of law. (*Ibid.*) Instead, the trial court correctly stated that it need not reach the second prong of the analysis, because the first prong of the anti-SLAPP analysis was dispositive. The complaint, on its face, alleged enough specific facts and circumstances to go beyond basic allegations of any defendant attorney conduct that would clearly be protected as petitioning activity. Thus, this matter was entitled to proceed beyond the anti-SLAPP stage.

Because of that threshold conclusion of law, we need not address additional points argued on appeal about the viability of the causes of action, insofar as they allege conspiracy between attorney and client, such that a prefiling requirement of permission to sue might have applied under Civil Code section 1714.10. Instead, we decide only that under the first prong of the applicable analysis, Mazzearella did not show the complaint essentially or substantially alleges only varieties of protected petitioning conduct. Accordingly, the burden was not shifted to plaintiffs to show they have established a probability of prevailing in the action. (§ 425.16, subd. (b)(1).)

DISPOSITION

The order denying the motion to strike is affirmed. Each party to bear its own costs.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.